

a

RAJESWARI THEDSHANAMURTHY

v.

KIN NAM REALTY DEVELOPMENT SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR

WAN HAMZAH J

b

[CIVIL SUIT NO. 3043 OF 1978]

6 APRIL 1981

c

CONTRACT: *Sale and purchase of property - Payment of booking fee - Booking application signed - Sale and purchase agreement not executed by developer - Whether there was a binding contract - Plaintiff claiming for breach of contract - Whether defence of frustration available to the defendant.*

d

The plaintiff paid booking fees for the purchase of two houses to be constructed by the defendant and signed a booking application which contained the terms and conditions of the booking one of which was that the defendant would call upon the plaintiff to enter into a formal sale and purchase agreement. The defendant in fact never called upon the plaintiff to execute the sale and purchase agreement and did not construct the houses booked by the plaintiff.

e

The plaintiff sought specific performance of the contract and in the alternative asked for damages for breach of contract. The defendant pleaded that there was no binding contract and alleged further that even if there was such a contract, it had been frustrated.

Held :*f*

[1] There is a binding contract between the defendant and the plaintiff which has been reduced into writing in the form of the booking application and which both parties have signed. One of the undertakings on the part of the defendant in the said contract is that it should get its solicitors to prepare the sale and purchase agreement, which undertaking the defendant is bound to perform. The non-performance of the undertaking was a breach of contract entitling the plaintiff to damages for breach.

g

[2] There was no condition imposed by the Government that the particular units sold to the plaintiff should be reserved for the State Development Authority as the representative of bumiputra buyers. In the circumstances the defendant's contention that the contract had been frustrated by reason of the Governments's intervention was without merit.

[3] The measure of damages suffered by the plaintiff was the difference between the current market price of a house in the same locality, of the kind which the defendant had failed to sell and deliver to the plaintiff, and the price at which the defendant had agreed to sell to the plaintiff, plus the amount of booking fees paid by the plaintiff.

[Plaintiff's claim allowed with costs.]

*h***Legislation referred to:**

Housing Developers (Control and Licensing) Rules 1970, Schedule C, r. 12(1)(c)

For the plaintiff - G.N. Das; M/s. Hisham, Sobri & Kadir

For the defendant - Heng; M/s. K.Y. Foo & Co.

i

JUDGMENT

Wan Hamzah J:

The plaintiff by specially indorsed writ sues the defendant for breach of agreements and applies for leave to enter final judgment.

On 15 March 1973, the plaintiff paid to the defendant RM1,000 booking fees for the purchase of two houses to be constructed by the defendant one each on two pieces of land called subplot No. 5 and subplot No. 7 respectively, at Jalan Kuban Buaya, Kuantan. In respect of each subplot the plaintiff and the defendant signed a document with heading "booking application", in which are stated the type of the house to be constructed being terrace single storey, and its price being RM16,950 and its area being 22 feet by 80 feet. In the document the defendant is called the developer, and the plaintiff is referred to as applicant. It contains a statement to the effect that the defendant accepted the application, and it also contains the following statement under heading "terms and conditions of booking":

The parties hereto agree as follows:

1. The applicant shall be registered as the purchaser.
2. The applicant shall not transfer, sell or assign the said Lot to any other person without the prior consent of the developer.
3. The applicant is deemed to have inspected and accepted the proposed plan of the House and the specifications and the siting of the said Lot and approved the printed sale and purchase agreement setting out the terms and conditions of sale.
4. The applicant shall when called upon by the developer or their solicitors within 14 days thereof execute the sale and purchase agreement to be prepared by the said solicitors **and it is hereby expressly agreed** that in the event of the applicant failing to execute the agreement as aforesaid, the booking fee paid to the developer shall be forfeited as agreed liquidated damages and this booking shall be rendered null and void.
5. All legal fees and stamp duties, incidental to the preparation of the sale and purchase agreement and the subsequent transfer of the said Lot shall be borne and paid by the applicant.
6. It is expressly understood that this booking is accepted subject to contract being executed in good time.
7. The said building is subject to approval by local authority or authorities.

The defendant has not called upon the plaintiff to execute sale and purchase agreements. Up to the beginning of 1975 the houses had not been constructed, and on 17 March 1975, the plaintiff wrote to the defendant's solicitors to enquire whether the houses would be built. She received no reply. Therefore she now sues the defendant for breach of agreements. The defendant in its statement of defence pleads:

- (a) that there is no binding contract between it and the plaintiff whereby it is bound to construct and sell houses to the plaintiff; and
- (b) that even if there are such contracts, they have been frustrated.

As to contention (a) it was submitted on behalf of the defendant that the parties have not fixed the term as to the method of payment and other terms for the sale and purchase agreements and you that reason and for the reason that sale and purchase agreements have not been signed by the parties there is no binding contract between it and the plaintiff. In fact the method of payment is fixed by the law in r. 12(1)(e) and Schedule C of the Housing

- a* Developers (Control and Licensing) Rules 1970, and the parties are bound to adopt that method. I hold that in respect of each subplot there is a binding contract between the defendant and the plaintiff which has been reduced into writing in the form of the document to which I have referred earlier and which both parties have signed, and in which one of the undertakings on the part of the defendant is that it should get its solicitors to prepare the sale and purchase agreement, which undertaking the defendant is bound to perform.
- b* As to contention (b) it is stated in the statement of defence that for approval of the conversion and subdivision of the land for the construction of the houses, the Government has imposed a condition that seven of the terrace houses and three of the bungalow houses to be built should be reserved for the State Development Authority as representative of bumiputra buyers. It is further stated that there is not a single bumiputra among all the 32 intending purchasers including the plaintiff who made bookings. It is contended that for this
- c* reason the contract with the plaintiff (if there is such a contract) has been frustrated by the condition imposed by the Government. I do not see how this contention can be upheld. It is not stated by the defendant how many houses were approved by the Government for construction. Besides, it is not a condition imposed by the Government that subplot No. 5 and subplot No. 7 be reserved for the State Development Authority. It is still possible for the defendant to sell subplot No. 5 and subplot No. 7 to the plaintiff. I hold that in respect of each
- d* subplot there is a contract which has not been frustrated.
- This is not a case where the parties had negotiated the terms for sale and purchase agreement and failed to agree on the terms. This is a case where the parties have reached agreement on certain terms and have also agreed to execute a written sale and purchase agreement. This means that it is still open to the parties to negotiate further terms which they have not
- e* considered and to include in the written agreement further agreed terms. It is implied that either party undertakes to negotiate any further terms not already agreed upon, if there is any such further terms not already agreed upon. It is submitted on behalf of the defendant that there is no binding contract because the parties have not finalised the terms to be included in the sale and purchase agreement. The fact is that the defendant had refused even to negotiate the terms to be included in the sale and purchase agreement, and refused
- f* to execute a sale and purchase agreement, and by so refusing it has breached its undertaking under the contract. The defendant has breached the contract in that it has failed to get a sale and purchase agreement prepared for execution, and it has failed to pursue the matter until completion of sale and purchase of the two houses which it has undertaken to construct and sell to the plaintiff.
- g* The plaintiff asks for damages in lieu of or in addition to specific performance. In my opinion, under the circumstances of this case damages is the appropriate and adequate remedy. The amount of damages should be measured by the difference between the current market price of a house in the same locality, of the kind which the defendant has failed to sell and deliver to the plaintiff, and the price at which the defendant had agreed to sell to the plaintiff, plus the amount of booking fee paid by the plaintiff. Therefore in respect of the two houses the damages should be RM57,100.
- h* Accordingly I give judgment for the plaintiff in the sum of RM57,100 and costs.

Also found at [1982] CLJ 82